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(included in your packet)

- Federal Indian Child Welfare Act (ICWA) is existing and controlling law for every State Court Nationwide.

- Progressive States have legislatively affirmed ICWA to increase compliance.

- Increased compliance decreases costs.

- Decreased costs include:

  - Financial (proper adjudication in a timely manner)

  - Human (permanency for children/certainty for families)

  - Reputation (States recognizing and following the Rule of Law)

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Our Children Are Sacred

WHY THE INDIAN CHILD WELFARE ACT MATTERS

By Judge Tim Connors

Seven generations ago someone was praying for us. We are the answer to their prayers. We take this responsibility seriously. When you are working with our children, it is sacred work. Our children are sacred.[1]

My mother Donna Lou was born in 1939. She and her family lived on Beaver Island in Michigan. After my grandmother died, my mother was separated from her brother and sent to be a domestic servant for a Mennonite minister and his wife in Fort Wayne, Indiana. This happened despite the fact that we had literally dozens of tribal family members who could have cared for her. Her Uncle Leo and his wife, for example, always wanted a daughter and would have loved to raise my mother. Unfortunately, she was sent away without any notice to her Indian family. While she was living with the Mennonites, she was forced to cut her hair outside of her Native tradition, prohibited from practicing Native American traditions, and prohibited from any contact with her Native American family and tribe. When she turned 17, she was forced into a loveless, arranged marriage. The marriage didn't last very long and she was on her own, alone in the world. She never had the courage to return home to her tribe because she felt so different and damaged. With her dark skin, black hair, and brown eyes she stood out as different from the majority of her peers in the 1950s and beyond. She never felt like she belonged anywhere. Without good examples of parenting, raising her children was a struggle for her. If my mother had been born after the passage of the Indian Child Welfare Act, and ICWA had been followed, she would've had a very different life and I would've had a very different mother.[2]

I first heard these words from Allie Greenleaf-Maldonado, a highly respected tribal attorney, while sitting in the back row of a lecture hall at the University of Michigan Law School. Maldonado and Matthew Fletcher, associate professor at the Michigan State University College of Law and director of its Indigenous Law Center, were presenting to Michigan's American Indian Law Student organization.

I came to learn that Allie's story was not an isolated incident. It was not even an exception. It was the general rule. And it happened during my lifetime, in my own backyard.

Our Federal Policy of Assimilation Began over 130 Years Ago

In 1878, Richard Henry Pratt, a military man turned educator, argued, "We can never make the Indians real, useful American citizens by any systems of education and treatment which enforce tribal cohesion and deny citizenship association." In time, Pratt advocated this

concept more bluntly: "Kill the Indian, save the man."[3]

Pratt began that process in 1879 when he opened the Carlisle Indian Boarding School in Carlisle, Pennsylvania. The school had been a military fort used during the Revolutionary War. For the next 40 years, over 10,000 Indian children were taken from their families and sent to Carlisle. Only 761 actually graduated. "Returning to the blanket," a term used to describe the resumption of traditional life, was seen as a sign of great failure.[4] But more disturbing were the statistics of those who never returned. Six boxes, catalogued as "dead files," sit in the National Archives. These boxes contain the names of the children who died at Carlisle or shortly after their return home. The published reports indicate children were dying at the school at a rate of three times the national average. Researchers suggest that these published reports were sanitized.[5]

From 1885 to 1895, for example, Apache children were sent to Carlisle from prisoner-of-war camps. Many of them died. During 1888 alone, a student died nearly every two weeks.[6] Too often both the Indian and the child were killed. Carlisle spawned an experiment carried out across our country for over 100 years. My wife Margaret and I went to Carlisle. We wanted to see where our federal policy of assimilation began. We met Barbara Landis, Carlisle Indian School biographer, who works at the local county historical society. Repeated inquiries came from Native Americans about the whereabouts of their ancestors, prompting her to create a website. Today, Native people can access resurrected information at www.carlisleindianschool.org.

We visited the school site. It is now a military college. The historical society will give you maps to guide you. The children's graves were moved and no longer represent the reality of the numbers who died. The displaced graves are adorned with gifts of tobacco, cloth, shells, and other remembrances from those who traveled to visit the remains. The "detention" rooms were actually prison cells, originally used for captured Hessian soldiers during the Revolutionary War. When children escaped, they were captured, brought back, and locked into these cells. You can still view them today. As I looked into one of them, I asked myself: What crime had these children committed, other than suffering acute homesickness?

Spotted Tail and Tribal Sovereignty

Many of the first "students" sent to Carlisle were from my native Michigan, as well as the children of Spotted Tail, related by marriage to Crazy Horse and a key figure in one of the landmark decisions regarding tribal sovereignty. In 1868, Chief Spotted Tail affixed an X on a treaty that recognized the Black Hills as part of the Great Sioux reservation and guaranteed exclusive use of the Black Hills to the Sioux people.

General George Custer changed all that. In 1874, he led an expedition into that protected land and announced the discovery of gold; the rush of prospectors followed. Within two years Custer attacked at Little Big Horn and met his demise. Spotted Tail kept his tribe out of the battle. A year later, the Black Hills were confiscated by the United States.

Crow Dog too was a Brule Sioux. He disagreed with Spotted Tail's actions and advocated a more forceful resistance for the survival of their tribe. In 1881, the two quarreled. Crow Dog survived.

In accordance with Sioux law, the tribal council met to address the reality of Spotted Tail's widow and offspring. The survival of the tribe was wholly dependent on the cooperation of all members in their migratory camp life. Punishment, retribution, or the application of an abstract system of justice or morality was not the driving force. Conflict termination and the peaceful reintegration of all members into a dependent coexistence was the necessity. The council ordered a transfer of items from Crow Dog to Spotted Tail's survivors for their continued support and the matter was resolved. Or so they all thought.[7]

The Territorial District Court of Dakota didn't like the Tribal Court's decision. Crow Dog was arrested, tried for murder, convicted, and sentenced to death. Crow Dog then petitioned for *Writs of Habeas Corpus* and *Certiorari* to the U.S. Supreme Court. Less than one month before his scheduled execution, the Supreme Court spoke: Crow Dog was to be set free. The Territorial District Court of Dakota had no jurisdiction over physical altercations between tribal members on Indian land. Title 28, § 2146 of the U.S. Revised Statutes granted "exclusive jurisdiction over such offenses . . . to the Indian tribes respectively" and Spotted Tail's X on the 1868 treaty didn't abrogate that right.[8]

Within two years, however, Congress enacted the Major Crimes Act extending federal jurisdiction to major felonies occurring between Indians in Indian country. This Act still rules today. Some opine that Congress would not have acted with such alacrity if it had been Spotted Tail (the perceived pacifist) who had survived Crow Dog (the perceived militarist). In any event, it was almost 100 years later before the Supreme Court upheld judgment in favor of the tribe, against the United States, for the illegal taking of the Black Hills.[9]

Two years before his death, Spotted Tail met with Carlisle's Pratt on the Rosebud reservation in the Dakota Territory. Pratt told Spotted Tail he had been sent to enroll his children in the school. Spotted Tail was skeptical. This was the same government that had violated the Black Hills treaty. Pratt told him, had the Indians been able to read what they were signing, they would have understood. The Indian's command of the English language, Pratt argued, was necessary to prevent future treaty violations. Reluctantly, Spotted Tail gave Pratt five of his children. When the children arrived at the empty military post on October 6, 1879, there was no food, no clothing, and no bedding. The children slept on the floor in their blankets.[10]

A year later Spotted Tail went to Carlisle himself. He was enraged. He condemned the military regime, the children's "soldier uniforms," the shorn hair, and his youngest son's incarceration in the prison cell. He immediately took his children out of Carlisle. He demanded the

return of all of the children from his tribe. This demand was refused. One of these children, Earnest White Thunder, begged to go home with Spotted Tail. He stowed away on the return train that Spotted Tail and his children took. He was discovered and forcibly taken back to Carlisle. He fell ill and was sent to the hospital, where he refused all medicine and food. He died less than two months after arriving at Carlisle.

Casualties of Assimilation

Carlisle had close ties with the Mount Pleasant Indian Industrial School in my native Michigan. I learned from tribal members of my generation that the boarding school experience for their parents was also traumatic. In fact, this intergenerational trauma was nationwide and still alive.

One tribal advocate recently educated a group of state court judges at a Tribal Leadership gathering held with members of the National Council of Juvenile and Family Court Judges (NCJFCJ). He explained to us the effects of colonization on tribal communities. Colonization and our subsequent federal policies had been a process of dismembering: dismembering of community, dismembering of spirituality, dismembering of language, dismembering of culture. Our tribal neighbors now are in a process of recovery from these policies. Part of the process of recovering is remembering. For many of our neighbors, remembering is painful.

I remember clearly the profundity of this gentleman's next comment:

> My mother is in her eighties. Even today, when I go to advocate on behalf of Indian rights she says, "Be careful what you say." My mother's generation was a generation of fear. Mine was a generation of anger. Sometimes in remembering we react with anger, even when an olive branch is being held out. But the generation that I am now hiring to do this work does not have fear. They do not have anger. They do have hope. This is where I like to think we are, and where we can stay.

Seeds of Self-Determination

The Supreme Court has determined that Congress has "plenary and exclusive authority" over Indian affairs through the Commerce Clause of the U.S. Constitution.[11] Nonetheless, views of the executive and judicial branches also have influenced federal policy toward tribal nations. *Worchester v. Georgia* (1832) is an illustrative example.[12] The state of Georgia wanted control in Cherokee land, contrary to their treaty with the United States. The U.S. Supreme Court concluded:

> The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and acts of congress.

Upon learning of this decision, President Andrew Jackson reputedly said, "John Marshall has made his decision, now let him enforce it." Jackson did nothing to enforce the decision, and the infamous Trail of Tears and a federal policy of forced removal followed.[13]

One hundred thirty-eight years later another president had a radically different view. On July 8, 1970, President Richard Nixon addressed Congress on the country's then-existing policy of forced termination:

> It is long past time that the Indian policies of the Federal government began to recognize and build upon the capabilities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.

Birth of the Indian Child Welfare Act and Self-Determination

On April 8, 1974, Congress began a series of hearings regarding Indian child welfare in the United States. The historical record can be found on the website of the Native American Rights Fund at www.narf.org. The statistical evidence received documented allegations that the removal of Indian children from their tribes and families was of massive proportions. The policies had generational, long-standing devastating effects.

Further testimony indicated the problem was widespread. In Montana, the ratio of Indian foster care placement was at least 13 times greater than for non-Indian children. In South Dakota, 40 percent of all adoptions made by the state were of Indian children, yet Indians made up only 7 percent of the population. In the state of Washington, the Indian adoption rate during this time was 19 times greater than for the non-Indian population.

Similar results were found in the Great Lakes region. In Michigan, an Indian child was 390 percent more often removed from his home than a non-Indian child; in Minnesota, 520 percent more often removed; and in Wisconsin, 1,560 percent. Poverty, poor housing, lack of modern plumbing, and overcrowding were often cited by social workers as proof of parental neglect and grounds for termination of parental rights. Physical abuse was cited in just 1 percent of the cases.

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Removal was often done without due process of law. Representation by counsel, expert testimony, and indeed the adjudicatory process itself were oftentimes nonexistent. In those states or communities that did not have a strong tribal presence, even less ability to monitor such actions existed. As a result, Congress passed the Indian Child Welfare Act in 1978. The Act is remedial in nature and attempts to change the goals of federal policy toward Indian children.[14]

Our federal policy toward our sovereign nations has pinballed between negotiation, removal, extermination, assimilation, termination, and now, finally, self-determination.

In January 2011, the NCJFCJ Board of Trustees passed the following resolution:

> RESOLUTION IN SUPPORT OF TRIBAL COURTS
>
> WHEREAS, the tribal courts serve the children and families of sovereign nations with their respective authority and with equal responsibility as the state courts serve their constituencies; and
>
> WHEREAS, the National Council of Juvenile and Family Court Judges (hereinafter referred to as the "National Council") acknowledges that the tribal courts have historically not been regarded as equal in status with the state courts and that, as a result, the tribal courts and the children and families served by the tribal courts have been denied many of the resources available to the state courts; and
>
> WHEREAS, the National Council in serving children and families, recognizes that tribal and state courts are equal and parallel justice systems; and
>
> WHEREAS, the National Council acknowledges the critical work of the tribal judges and the tribal judicial leadership organizations that support the important work of tribal judges to develop and implement effective practices, and to strive to provide the supports for tribal courts to effectively serve native children and families; and
>
> WHEREAS, the National Council is committed to partnering with tribal courts and judges as allies consistent with the commitment of all courts to meet the needs of all children and families served by the state courts and tribal courts without discrimination or favor; and
>
> WHEREAS, the voice of tribal court judges is a necessary component in NCJFCJ's ability to fulfill its mission; and
>
> WHEREAS, the National Council recognizes that children and families are best served within the contexts of their community and honors the relationship that tribal courts have within their Tribes.
>
> BE IT THEREFORE RESOLVED that the NCJFCJ Board of Trustees is, and shall be, committed to engaging the tribal courts as full partners in fulfilling the mission of the National Council and in meeting the needs of all children and families served by the state and tribal courts, complying with the letter and the spirit of all laws effecting [sic] native children and families including, but not limited to, the Indian Child Welfare Act, the Adoption and Safe Families Act in a context that supports tribal culture, the Tribal Law and Order Act, and the full faith and credit provisions of the Constitution and of federal laws of the United States.
>
> BE IT FURTHER RESOLVED that the National Council shall work with the tribal courts, tribal governing bodies, and other tribal authorities to ensure equal treatment of, and resources for, all native families and children at all levels of government.

Final Thoughts

The NCJFCJ Board of Trustees' Resolution is an important step in bridging the existing gap between tribal/state court relationships. Legal communities across the country likewise urge us. The State Bar of Michigan's Judicial Crossroads Task Force, for example, recently found:

> [t]he courts are pivotal players in the child welfare system, and the need for courts to respond more effectively than in the past to child welfare problems is urgent. As Michigan's economy has deteriorated, our child welfare caseloads have increased, but the resources to deal with abuse, neglect, juvenile justice, and homeless and runaway youths are diminishing. Failure to deal early and effectively with child welfare problems generates greater costs in later years.[15]

It went on to recommend:

- Support the adoption of Federal Indian Child Welfare Act Concepts into Michigan Law.
- Institutionalize partnerships between the Michigan Supreme Court/SCAO and Tribal Courts, the Michigan Indian Judicial Association, lawyers, and other stakeholders in Indian/First Nation issues to improve meaningful access to justice in Michigan State Courts.[16]

In the last decade, the Bureau of Justice Assistance, a component of the U.S. Department of Justice, has provided funding for tribes to establish and sustain justice systems. It also recognizes the value of bringing tribal, state, and federal justice entities together to talk and listen. The National Tribal Judicial Center (NTJC) in Reno, Nevada, has facilitated a number of these "gatherings." I have attended them, and they are enriching. It is a tremendous opportunity for state court judges to learn from our tribal courts how they address their justice needs in culturally appropriate ways. As a state family court judge, I was particularly impressed with the philosophical approach our tribal neighbors bring to their litigants. It was clear to me that our state system could

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a party to the action, unless the objecting party claims some personal right or privilege with regard to the documents sought. As a result, the court concluded that an individual has a personal right in information in his or her profile and inbox in the same way that an individual has a personal right in employment and bank records, and as such the plaintiff in the case had standing to bring a motion to quash. The net effect of the court's holding was that the account web pages and communications that were not publicly available were protected from disclosure by the Stored Communications Act.

Final Comments

Generally, the opinions discussed above interpreting the Stored Communications Act are understood to provide that, while the court may not enforce a civil discovery subpoena directed to Internet and e-mail service providers themselves to produce a user's private communications, the court may order the litigant to turn over the information. Accordingly, when a party seeks e-mail and other electronic information, the direct route of first seeking the discovery from the party or witness should be considered. When one party seeks to obtain electronic information and communications from an Internet or e-mail service provider by use of a civil discovery subpoena, be aware of the limitation imposed by the Stored Communications Act. The limitation? The antithesis of the famed e-mail announcement that we grew to know and love in the early days of the Internet, namely, a response by Internet and e-mail service providers to any subpoena that translates roughly to "We've got mail, and you can't have it!" ■

Endnotes

1. Quantum Computer Service, located in Vienna, VA, came into being in 1985. In 1991, Quantum was renamed "America Online."
2. *In re Subpoena Duces Tecum to AOL*, 550 F. Supp. 2d 606, 610 (E.D. Va. 2008).
3. Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1216–17 (2004).
4. 44 Cal. Rptr. 3d 72, 76–77 (Cal. Ct. App. 2006).
5. 717 F. Supp. 2d 965 (C.D. Calif. 2010).

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benefit from the tribal courts approach. It was also clear to me that there was value in NTJC's purpose: recognizing the necessity for increased collaboration, cooperation, and communication through increasd dialogue among the three justice communities. As judges, our commitment to these principles will foster positive change for each of our justice systems.[17]

Recognition and enforcement of the Indian Child Welfare Act in our state courts is fundamental to the survival and integrity of our federally recognized tribes. A respectful government-to-government alliance can, and should, be our reality. In honoring, upholding, and enforcing the Indian Child Welfare Act in our state courts, we act in accordance with the judicial oath of office we all took in order to serve. It is our duty, our legal obligation, and our moral responsibility. ■

Endnotes

1. Tribal Court Judge to National Council of Juvenile and Family Court Judges, Tribal Judicial Leadership Gathering, Dec. 2010.
2. Allie Greenleaf-Maldonado, Asst. Gen. Counsel, Little Traverse Bay Band of Ottawa Indians, Harbor Springs, Mich.
3. Genevieve Bell, Telling Stories out of School: Remembering the Carlisle Indian Industrial School 1879–1918, at 38, 39 (June 1998) (Ph.D. dissertation, Stanford University).
4. *Id.* at 331.
5. *Id.* at 386.
6. *Id.* at 387, 388.
7. Sidney L. Harring, Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century 100–01 (Cambridge Univ. Press 1994).
8. *Ex parte* Kan-Gi-Shun-Ca (otherwise known as Crow Dog), 109 U.S. 556 (1883).
9. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).
10. Barbara Landis, *Carlisle Indian Industrial School History*, http://home.epix.net/~landis/history.html.
11. Jacqueline Fear-Segal, White Man's Club Schools, Race, and the Struggle of Indian Acculturation 245 (Univ. of Nebraska Press 2007).
12. Nell Jessup Newton et al., Cohen's Handbook of Federal Indian Law 398 (2005 ed.) (citing United States v. Lara, 541 U.S. 193, 200 (2004)).
13. 31 U.S. 515 (1832).
14. Walter R. Echo-Hawk, In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided 109–10 (Fulcrum 2010).
15. Allie Greenleaf-Maldonado, Faculty Presenter, Walking on Common Ground Gathering, Traverse City, Mich. (Oct. 2010).
16. State Bar of Michigan Judicial Crossroads Task Force, Report and Recommendations: Delivering Justice in the Face of Diminishing Resources 17 (Jan. 2011).
17. Christine Folsom-Smith, the National Tribal Judicial Center, Walking on Common Ground: Trial-State-Federal Justice System Relationships, 2008.